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No. 75-531

In the Supreme Court of the United States

OCTOBER TERM, 1975

TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Alleging immunity from liability under the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.*, petitioner Texas State Board of Public Accountancy (Board) contends that the court of appeals erred in summarily reversing the district court's refusal to enforce a Civil Investigative Demand (CID) served upon the Board in connection with an antitrust investigation.

The United States served upon the Board a CID, a form of administrative subpoena issued pursuant to Section 3 of the Antitrust Civil Process Act, 76 Stat. 548, 15 U.S.C. 1312, after a preliminary investigation revealed that accountants in the State of Texas and the Board may be engaging in anticompetitive

practices—*e.g.*, the Board has adopted and apparently enforces an "encroachment" rule prohibiting competitive bidding and solicitation. The CID directed the Board to produce documents related to its adoption and enforcement of the encroachment rule as well as documents relevant to showing the relationship between the Board and the State of Texas (Pet. App. 3d-4d).

The Board refused to produce the requested documents, however, and commenced this action under 15 U.S.C. 1314(b) to have the CID set aside. Relying upon *Parker* v. *Brown*, 317 U.S. 341, the Board contended that it could not be compelled to comply with a CID because it acts as an agency of the State of Texas and is therefore exempt from the Sherman Act. The United States responded by filing a petition for enforcement under 15 U.S.C. 1314(a) (Pet. App. 1e-2e).

Although the district court acknowledged that courts ordinarily refuse to adjudicate claims of immunity or exemption from regulatory provisions in actions brought to enforce administrative subpoenas, it nonetheless held that the Board was immune from the Sherman Act and, therefore, could not be required to comply with a subpoena issued pursuant to the Antitrust Civil Process Act (*id.* at 3e, 4e-6e). The United States appealed this decision to the United States Court of Appeals for the Fifth Circuit and moved for summary reversal. The government asserted that the district court had incorrectly adjudicated the board's claim of immunity from the Sherman Act in a proceeding to enforce a CID rather than deferring the immunity issue for resolution on the basis of a complete factual record in the event that the United States filed an antitrust suit against the Board. The court of appeals summarily reversed (Pet. App. 1a).

The ruling of the court of appeals is in accord with several decisions of this Court, and the petition presents no issue warranting further review.

1. The Board's assertion that the decision below presents a question with respect to the scope of *Parker* v. *Brown* is incorrect. The government sought summary reversal in the court of appeals solely on the ground that the district court had erred in attempting to resolve an immunity question on an inadequate record in a CID proceeding. The court of appeals' decision presumably was based on that ground, and would not have any collateral estoppel effect if the government ultimately were to file a Sherman Act complaint and the Board or other parties were to assert a *Parker* v. *Brown* immunity defense.

2. An immunity question cannot be litigated in a proceeding to enforce a CID. This Court has consistently held that federal courts cannot adjudicate claims of immunity or exemption from regulatory provisions in actions brought to enforce administrative subpoenas. See, *e.g.*, *Federal Trade Commission* v. *Crafts*, 355 U.S. 9; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501. These cases expressly recognize the power of an administrative agency to gather sufficient facts during the investigative stage of a case to enable it to make an intelligent determination as to the scope of its jurisdiction. Indeed, this case is indistinguishable from *Federal Trade Commission* v. *Crafts*, *supra*. In that case, the court of appeals refused to enforce a Commission subpoena on the ground that the respondent insurance company was immune from federal regulation under the McCarran-Ferguson Act (244 F. 2d 882 (C.A. 9)), and this Court summarily reversed (355 U.S. 9).

The rule that immunity and other substantive defenses on the merits cannot be resolved in an action to enforce an investigatory subpoena is fully applicable to CID proceedings. First, *Parker* v. *Brown, supra,* the case upon which the Board's claim of immunity is premised, has never been applied to bar production of subpoenaed documents.[1] Furthermore, contrary to the Board's assertion (Pet. 10), Section 5(b) of the Antitrust Civil Process Act, 76 Stat. 551, 15 U.S.C. 1314(b), is not an explicit authorization for the district court to adjudicate an immunity claim in a CID enforcement proceeding.

The legislative history relating to the statutory language authorizing a court to modify or set aside a CID "upon any constitutional or other legal right or privilege" does not refer to defenses on the merits. Rather, it evidences a congressional intent to authorize a district court to determine whether the documents sought by the CID are privileged or otherwise protected against disclosure

[1]In any event, the immunity question that might be presented in an antitrust action against the Board could not be resolved on the basis of the sparse record in the CID proceeding. As the Board apparently acknowledges in its discussion of this Court's recent decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (Pet. 15-16), it is only after a detailed factual analysis of the degree of state involvement in an agency's anti-competitive practices that authorities charged with enforcement of the antitrust laws can determine whether a prospective defendant is immune from suit. The CID in this case specifically directed the Board to produce documents establishing its relationship with the State of Texas. Such documents would provide a more adequate record upon which to base a decision on the applicability of *Parker* v. *Brown.* See *United States* v. *Morton Salt Co.,* 338 U.S. 632; *Federal Maritime Commission* v. *Port of Seattle,* 521 F.2d 431, 434-435 (C.A. 9); *New Orleans Public Service, Inc.* v. *Brown,* 507 F.2d 160, 165 (C.A. 5); Securities & Exchange Commission v. *Brigadoon Scotch Dist. Co.,* 480 F.2d 1047, 1052-1054 (C.A. 2); *Amateur Softball Ass'n of America* v. *United States,* 467 F. 2d 312, 315-316 (C.A. 10).

by an evidentiary rule. Thus, the examples given during the Committee Hearings on this section to illustrate the types of documents that could not be obtained by means of a CID were documents protected by (i) the attorney-client privilege and (ii) the attorney work-product rule of *Hickman* v. *Taylor,* 329 U.S. 495. Hearings on S.167 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 51-55 (1961). Since the evidence sought by the CID was not "plainly incompetent or irrelevant to any lawful purpose" of the government in discharging its duties under the Sherman Act, *Endicott Johnson Corp.* v. *Perkins, supra,* 317 U.S. at 509, the court of appeals properly reversed the district court's denial of enforcement.[2]

3. The Board also asks (Pet. 16-19) this Court to determine whether the court of appeals acted properly in deciding the case on a motion for summary reversal. The Board contends that the court of appeals should have followed a summary calendar procedure that would have allowed more time for filing a responsive brief.[3] However, the court did not abuse its discretion in electing to follow a motion procedure in this case. Since the legal issue had already been decided by this Court, expedited consideration was in the public interest, and the Board suffered no prejudice by that procedure. Indeed, the Board did not request an extension of time for the filing of

[2]The Board has not alleged that compliance with the CID would be unreasonable or oppressive or that the United States has conducted its investigation in bad faith.

[3]The court of appeals did not shorten the time for filing a memorandum in opposition to the government's motion. The government's motion was mailed on July 25, 1975, and the memorandum in opposition was accordingly due on August 4, 1975. See Rules 27(a) and 26(c), Federal Rules of Appellate Procedure.

a response and in fact filed a comprehensive response to the government's motion. Moreover, the Board did not challenge the court of appeals' choice of procedure below. On the contrary, the Board agreed that the case did not require oral argument and urged the court summarily to affirm. Answer to Motion for Summary Reversal, pp. 2, 13.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.